No. 127.

Y. of Conely for D. C.

SUPREME COURT OF THE UNITED STATES.

Filed Sept. 15, 1898.

Office Supreme Court, U. S.
FILED
SEP 15 1898
JAMES H. McKENNEY,
CLERK.

UNITED STATES,
Plaintiff in Error,
vs.
TER S. HARSHA.

No. 903. 127.

BRIEF FOR MR. HARSHA.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.,
1898.

SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

THE UNITED STATES,
Plaintiff in Error,
vs.
WALTER S. HARSHA.

No. 401.

BRIEF FOR MR. HARSHA.

STATEMENT.

Mr. Harsha, for many years, had been the clerk—*de jure et de facto*—of the Circuit Court of the United States for the Eastern District of Michigan, having been duly appointed to that office June 6, 1882.

On June 16, 1891, he was appointed clerk of the Circuit Court of Appeals, Sixth Circuit, and was the first person to hold that office.

After his acceptance of the latter appointment, some question was made by the Comptroller of the Treasury concerning Mr. Harsha's right to retain the office of clerk of the Circuit Court and to receive the emoluments of it. The matters in difference took the form of litigation, and were finally heard and determined by the Court of Appeals in 1893.

The Court held:

1. That Mr. Harsha had not vacated his office within the meaning of the Act of Congress of June 20, 1874, § 2 (18 Stat., 109), by accepting the position of the clerk of the Circuit Court of Appeals.

2. That the question of his right to the office of clerk of a circuit court, and to the compensation belonging thereto, could not be determined by the auditing of his account in the Treasury Department.

3. That Rev. Stat., § 1763, did not prohibit him, though receiving $3,000 per annum as clerk of the Circuit Court of Appeals, from receiving further compensation as clerk of the Circuit Court when he lawfully held both offices.

United States vs. Harsha, 56 Fed. Rep., 953, s. c. 6 C. C. A. Rep., 178.

When Mr. Harsha, on June 6, 1882, was appointed clerk of the Circuit Court, he took the oath of office, filed his official bond in the sum of twenty thousand dollars, and entered upon the discharge of the duties of the office.

From the date of his induction into the office to the very moment of this writing, he has been acting continuously and uninterruptedly under his appointment by the judges of the Circuit Court, and with their continued assent and approval, under a *bona fide* claim of title to the office. *No other person had or made any claim of title to the place.*

Record, p. 1.

During this same period of time he has performed fully and faithfully all of the duties and all the services that could be lawfully required or expected of the clerk of the Circuit Court, and the United States, the Court, and all suitors therein have received the full benefit of the same.

Record, p. 1.

When he was appointed clerk of the United States Circuit Court of Appeals, for the Sixth Circuit, on June 16, 1891, he took the oath of office, filed his official bond in the sum of twenty thousand dollars, and entered upon the discharge of the duties of that office. He performed the duties required of the clerk of the Court of Appeals and received salary therefor at the rate of three thousand dollars per annum, until October 2, 1894, when his resignation, delivered to the judges of the Court of Appeals on February 24, 1894, was accepted.

Record, p. 1.

When Mr. Harsha presented his resignation to the judges of the Circuit Court of Appeals, the Act of June 20, 1874, above cited, was in force, and he was in lawful possession of both offices and entitled to all lawful compensation to be derived therefrom.

Having performed the duties of the office of clerk of the Circuit Court, as above narrated, continuously, and without question by any representative of the United States having authority to question his right to perform the duties of the office, Mr. Harsha prepared and presented his account to the Treasury Department in the usual course and manner. He was then advised by the Comptroller of the Treasury that he was not entitled to any compensation whatever for anything done by him as clerk of the Circuit Court of the United States for the Eastern District of Michigan, after July 31, 1894, and was referred to the Act of Congress of that date containing the following provision:

"No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached

unless specially heretofore or hereafter specially authorized thereto by law."

28 Statutes at Large, 206.

It is a little peculiar that a permanent regulation of this sort should be hidden under the verbiage of a temporary appropriation bill, where no one would suspect its presence; but, as the Constitution of the United States (unlike many State Constitutions) does not prohibit this manner of legislating, I suppose that it can only be criticised, not condemned. It reminds me of a search which I made something like twenty-five years ago for the provision repealing the statute requiring bank checks to bear a two-cent stamp, and, after a long and tedious examination, I discovered it in an Act of Congress regulating the import duties on canned fish and the like.

And it is not surprising that the above quoted provision escaped the notice of not only Mr. Harsha, but also of the judges of the Circuit Court, and the judges of the Circuit Court of Appeals.

Mr. Harsha has not received any formal appointment to the office of clerk of the Circuit Court since October 2, 1894 (the date of the acceptance of his resignation of the office of the clerk of the Circuit Court of Appeals), and the Comptroller of the Treasury makes that fact and the Act of July 21, 1894, his justification for withholding from Mr. Harsha all compensation for services rendered from the last mentioned date to the present time.

Whether the Comptroller will supplement his refusal of compensation with a demand for an accounting for all moneys received by Mr. Harsha for personal services rendered litigants in connection with his office, remains to be seen.

At present the Comptroller's position is as follows:

1. Mr. Harsha's account prior to July 31, 1894, may be allowed.

2. His account from July 31, 1894, to and including October 2, 1894, should be rejected.

3. His account subsequent to October 2, 1894, should be rejected.

At the hearing of this cause in the Circuit Court, Judge Severens ruled as follows:

1. Mr. Harsha's account prior to July 31, 1894, is allowed.

2. His account from July 31, 1894, to October 2, 1894, is disallowed.

3. His account subsequent to October 2, 1894, is allowed.

The United States claims error in the allowance of any portion of Mr. Harsha's account subsequent to July 31, 1894.

Mr. Harsha claims error in the disallowance of his account from July 31, 1894, to October 2, 1894.

Both parties sought relief in the Court of Appeals, and by that Court the case is certified to this Court.

Three questions are presented:

ARGUMENT.

FIRST QUESTION.

Can such a judgment, rendered under the act of March 3, 1887, in the Circuit or District Court, be brought before this Court for review in any other mode than as provided in Section 707 of the Revised Statutes for the review by the Supreme Court, of judgments of the Court of Claims, to-wit, by appeal?

Record, p. 2.

1. The point suggested by this question was not raised when the case was argued in the Court of Appeals. In

that court, counsel assumed that the appellate proceedings were lawful and regular, and the Court made no observation about the matter.

2. Both parties sought relief in the Court of Appeals. It would hardly be candid on the part of counsel for Mr. Harsha, to insist that a negative answer should be given to the above question.

3. Personally, I think that the considerations offered by the counsel for the United States, in discussing this question, justify an affirmative answer, and I will not repeat his argument.

SECOND QUESTION.

Did the Act of July 31, 1894, above referred to, ex proprio vigore, create a vacancy in the office of clerk of the Circuit Court for the Eastern District of Michigan, by reason of the fact that, at the time of its taking effect, the then lawful incumbent of that office was also holding the office of clerk of the Circuit Court of Appeals for the Sixth Circuit?

I submit that this question should be answered in the negative.

The learned counsel for the United States, discussing the statute under consideration, says: "The language is clear and unequivocal."

This is true. But it is no clearer and no less equivocal than many other legislative enactments, which have required judicial interpretation in order to effectuate the legislative intent in a practical, rational manner.

It is true that, under some circumstances, where the language is explicit and the intent manifest, it is sufficient to say *Ita lex scripta est.*

But it is not often that even a statutory rule is applied according to the letter rather than the spirit. Common

law rules often bend to the circumstances of the particular case, and statutory enactments are construed so as not to work injustice, wrong or oppression.

Even in the interpretation of constitutional provisions, the mere letter of the law is not always followed.

These considerations, it seems to me, should be borne in mind in construing the act of July 31, 1894.

1. Does not the act of July 31, 1894, operate prospectively?

Is not the proper interpretation of it that it prohibits after the passage of the act, anyone from making the appointment, and, if appointed, the appointee from holding the particular office?

Ordinarily, at least, a statute will be construed to operate prospectively, unless it plainly appears that it is intended to operate retrospectively or to change existing conditions.

It is no answer to this suggestion to say that Congress has the power to make the act operate otherwise than prospectively. The question is not one of authority, but of intention, ascertained by statutory construction according to judicial rules.

Nor are we aided in reaching a correct conclusion by the suggestion that Mr. Harsha's title to the office had none of the essentials of a vested right. He may not have had an irrevocable title and yet it may be that Congress did not intend to vacate the office which he lawfully held at the time of the adoption of the Act of July 31, 1894, or, so intending, may not have used apt language to accomplish the desired result.

Nor is it inconsistent with the claim that this statute shall operate only upon appointments made after the act, that the words, "unless specially heretofore or hereafter specially authorized thereto by law," are used. That language applies as well under one construction as

another, and simply excepts from the operation of the act, whichever way it operates, all officers having the requisite special sanction.

I understand it to be the rule that where it is doubtful whether appropriate language has been used to justify any construction other than that giving prospective operation, such operation only will be given.

Doubt of the legislative intent is not necessarily removed by the fact that the language used in the statute is simple and positive. Doubt often arises when facts are presented which seem to make it unreasonable, unjust or oppressive to apply the statute literally.

I think that some force is lent to the suggestions here offered by the language used in the act.

If Congress had intended to vacate existing offices, by the mere force of the language used, it seems to me that the legislative will would have been expressed, if not in different language from that used in the act, at least by the omission of the words, "be appointed to or." The fact that Congress uses the word words "be appointed to," before and in connection with the expression "or hold any other office," would seem to indicate that the act was intended to apply to cases of appointment subsequent to the passage of the statute, and that the later words, "or hold any other office," simply energize the legislative expression, without giving the act a retrospective operation.

2. It would not be just or proper to belittle the Congress of the United States by claiming that the legislation under consideration was intended to reach a particular case.

Nor do I think it fair to argue that Congress, by the Act of July 31, 1894, sought to vacate one set of offices rather than another, by what would amount to a mere fiat.

If a person, not an incumbent of an office, were tendered two appointments, both of which he could not lawfully hold at the same time, he certainly would have the option of accepting one or the other.

So, too, if the incumbent of an office, yielding a salary of twenty-five hundred dollars per annum, were tendered another office, he would have the right to reject, or accept with the consequences.

Did Congress intend to discriminate in this particular against those who at the time of the passage of the act, happened to hold two offices, one of which afforded the compensation mentioned in the statute? It seems to me that no such difference of treatment was contemplated.

Suppose, at the time the act of July 31, 1894, went into operation, Mr. Harsha had held two offices, each of which afforded him the annual salary or compensation of twenty-five hundred dollars? Who can say, in the absence of some act on the part of Mr. Harsha, which office was vacated? Yet in terms, the act of July 31, 1894, would apply as well to such a case as to that of a person holding two offices, one of which afforded a salary of twenty-five hundred dollars per annum, and the other an uncertain amount of fees? And *non constat* that in the present instance, the office which afforded fees was not better, all things being considered, than that which afforded a salary.

of removal whenever it sees fit so to do.

It may be unnecessary to discuss at length this feature of the case, but I regard the point as worthy of consideration, and submit it.

All that I have said thus far, however, leads to this:

(a) That Congress did not intend that this act should

affect persons already lawfully in office at the time of the passage of the act, or

(b) That a person lawfully holding two offices at the time of the enactment of the statute, at the most, would be obliged to elect or choose the office which he would retain.

Hence, the act of July 31, 1894, did not *ex proprio vigore*, create a vacancy in the office of clerk of the Circuit Court for the Eastern District of Michigan, but provided that the incumbent of the office (if the statute applies to his case), would have imposed upon him the option and duty of choosing which office he would retain.

This seems to me a just and reasonable interpretation of the statute under consideration, and the proper answer to the second question submitted by the Court of Appeals.

THIRD QUESTION.

Does the general rule that officers de facto may not recover by suit, compensation for services rendered as such, apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power under a bona fide claim of title to the office, when no other person has at any time, made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal re-appointment, and a failure on the part of the incumbent formally to re-qualify after a technical vacation of the office originally held by him under a valid appointment and qualification?

To discuss this question academically, will aid neither the Court nor the defendant in error.

The facts of the particular case are so peculiar that, in my judgment, the matter cannot be properly determined

unless Mr. Harsha's situation and action are thoroughly understood and appreciated.

On July 30, 1894, Mr. Harsha was clerk of the Circuit Court for the Eastern District of Michigan and clerk of the Court of Appeals. He was actually and lawfully discharging the duties of both offices.

His relations with those offices at that time, however, were not precisely the same.

Prior to that date, to-wit, on February 24, 1894, he had presented his resignation of the office of clerk of the Court of Appeals to the judges of that court.

So far as Mr. Harsha was concerned, he had resigned the office and simply awaited a successor to whom he could surrender whatever governmental authority and governmental property he at the time possessed.

It will be noted, and, I trust, borne in mind, that Mr. Harsha resigned, so far as he was concerned, the office of clerk of the Court of Appeals *before* the Act of July 31, 1894, was passed.

I call especial attention to this fact because, whether Mr. Harsha, after the Act of July 31, 1894, went into effect, had the right to choose which office he would retain, he exercised that choice prior to the last-mentioned date, and at a time when the law unquestionably gave him the right to retire from either and hold the other. Mr. Harsha never withdrew his resignation of the office of clerk of the Court of Appeals, and the judges of that court thoroughly understood that he was simply remaining as a *de facto* incumbent, so to speak, for their convenience, and the benefit of the United States.

The judges of the Court of Appeals accepted Mr. Harsha's resignation and appointed his successor on October 2, 1894, until which time Mr. Harsha remained in the occupancy of the office, and performed the duties appertaining to the same.

As no question can be made of Mr. Harsha's good faith, the following should be taken as established:

(a) That he did not intend to abandon and never did abandon the office of clerk of the Circuit Court for the Eastern District of Michigan.

(b) That he did intend to surrender the office of clerk of the Court of Appeals, and had actually resigned it before the statute of July 31, 1894, was passed.

(c) That he did all that he could and should have done to make his intent and act effective.

At this time, Congress had made no provision for a deputy clerk or assistant clerk, or any other person to whom Mr. Harsha could have surrendered the office and official property.

It is true, as a matter of fact, that Mr. Harsha could have walked out, turned the key in the door, and left the records, files and other official property without custodian or protection; but was it his duty to do so, as a matter of law, in order that he should not be held to have retained the office of clerk of the Court of Appeals?

Can it be said, with reason and good sense, that under the circumstances of this case, the United States expected that Mr. Harsha would abandon his post and leave unprotected, the office, records and files of the court, important documents and other property, public and private, close the court to suitors and their representatives, and generally suspend the clerical administration of the Court of Appeals?

Mr. Harsha, as clerk of the Court of Appeals, had given an official bond, conditioned expressly or impliedly, that he would safely keep and deliver to his successor, the official property in his hands or under his control. When the act of Congress went into effect on July 31, 1894, he was in the lawful possession of the office, and of all of the property of the United States appertaining to it. It was

his duty to retain such possession and make suitable transfer to his successor. This he certainly could not do until his successor was appointed.

I think that it may be taken for granted:

(a) That Congress did not intend to abolish the office of the clerk of the Court of Appeals.

(b) That Congress did not intend to obstruct, embarrass or confuse the administration of the affairs of that court.

In this instance, no other person claimed the office of clerk of the Court of Appeals. No other person had the right to it. The United States raised no question and made no complaint. They who were *pro hac vice* the United States, must be taken as having desired Mr. Harsha to remain temporarily.

Whatever Mr. Harsha did was for the benefit of the United States, and, had another person performed the services, the compensation would have been the same.

Mr. Harsha did not resign the office of clerk of the Circuit Court for the Eastern District of Michigan, but continued to hold that office and perform the duties thereof with the knowledge and assent of the judges of that court.

True, he performed provisionally, with the approval of the judges of that court, the duties of the office of clerk of the Circuit Court of Appeals. It is, by this act, says the Comptroller, that Mr. Harsha vacated the office of clerk of the Circuit Court for the Eastern District of Michigan, though neither he nor the judges expected or intended any such result. But what Mr. Harsha did in the matter of making an election, and what he did in respect of the office of clerk of the Court of Appeals *ad interim*, were entirely satisfactory to the Circuit Court for the Eastern District of Michigan, and the judges thereof.

The judicial branch of the Federal Government must be understood as having recognized Mr. Harsha's election to

retain the office of clerk of the Circuit Court, and as having approved his retention of that office, under the circumstances of this case.

The unbroken continuity of his administration of the affairs of the office of clerk of the Circuit Court for the Eastern District of Michigan can be accounted for in no other way.

Mr. Harsha's resignation of the office of clerk of the Court of Appeals was in form accepted by the judges of that court, on October 2, 1894. Mr. Harsha certainly then became qualified to hold the office of clerk of the Circuit Court. The appointing power in the particular instance, was lodged in the judges of that court. They continued him in office. They approved his retention of it. They recognized his official acts, and gave full credit to them daily. According to law, they must have had a clerk, and according to the fact, they had no clerk but Mr. Harsha.

He held the office under color of the original appointment, in good faith, with the sanction and approval of the judges of that court.

Under the circumstances, this is tantamount to a reappointment (if such was necessary), and should be so regarded.

In the brief of counsel for the United States, it is said that the claimant persistently refused to take the oath of office.

Brief for the United States, p. 16.

There is nothing in the certificate of the judges of the Court of Appeals which justifies this remark, and the matter in difference between Mr. Harsha and the United States has never turned on this point.

Counsel for the United States also remark that both by custom and the accepted law, appointments are made and should be made in writing.

Brief for the United States, p. 20.

I am willing to concede that it is better to make an appointment by written instrument, but I deny that there was any law that required it in Mr. Harsha's case.

The attention of the Court is solicited to its recent decision and the opinion of Mr. Justice White, in the case of the *United States vs. Lewis A. Eaton*, decided February 28, 1898. It seems to me that that case goes far towards sustaining my contention in this case.

EDWIN F. CONELY,
Counsel for Mr. Harsha.